

EMPLOYMENT APPEALS TRIBUNAL

CLAIM OF:

Employee

CASE NO.

UD497/08

MN452/08

WT209/08

against

Employer

under

**UNFAIR DISMISSALS ACTS, 1977 TO 2001
MINIMUM NOTICE AND TERMS OF EMPLOYMENT ACTS, 1973 TO 2001
ORGANISATION OF WORKING TIME ACT, 1997**

I certify that the Tribunal
(Division of Tribunal)

Chairman: Ms. P. McGrath B.L.

Members: Mr. F. Moloney
Mr. S. Mackell

heard this claim at Naas on 8th October 2008.

Representation:

Claimant: Mr. Pat Reidy, Reidy Stafford, Solicitors, Kilcullen, Co Kildare

Respondent : Mr. Gerry Burns, Burns Nowlan, Solicitors, 31 Main Street, Newbridge,
Co. Kildare

The determination of the Tribunal was as follows:-

Respondent's Case:

The Managing Director and proprietor of the respondent company gave evidence. The company employed ten employees. The claimant commenced work with the company on 4th April 2000. His son, manager of the company, told him that the claimant had telephoned on Monday, 11th February 2008 indicating that he had the flu and would not be able to attend work. That morning the manager called to the claimant's house to collect the company mobile phone. He spoke to the claimant's mother. She told him the claimant had been assaulted in the early hours of Sunday morning, 10th February 2008 outside a nightclub and she asked him if he wanted to see the claimant who was in bed. His son declined. The first medical certificate was received from the claimant on 22nd February 2008 and covered the period 25th February 2008 to 10th March 2008. The medical certificate stated that the claimant had a soft tissue injury. The respondent paid the claimant's first week salary.

The claimant had been seen out and about the town during his absence from work. The Managing

Director enquired from the Gardai if an assault had been reported. It had not.

The Managing Director wrote several letters to the claimant stating that he expected him to return to work. He wanted the claimant to contact them so that the matter could be regularised. He felt the claimant no longer wished to work in the company. The claimant replied to the respondent indicating that he was disappointed at the way he had been treated and regretted that his eight years of service had ended and to send on his papers.

Under cross-examination the Managing Director said the claimant had never been issued with a contract of employment and no policies existed in the company. However, the claimant had been informed verbally.

The reason the manager took a piece of paper marked with the claimant's absences from work to his house on the morning of 11th February 2008, was to make him aware that time keeping was important. He did not believe the claimant was unfit to resume work. He needed to know how long the claimant would be absent from work and wanted the claimant to talk to them.

The Managing Director contented that the claimant had taken 2 ½ days holidays in January. In his final letter to the claimant dated 8th April 2008 he outlined what money was owed to the company. He said there was no disciplinary or guideline policies in the company. When an employee was out sick he/she is normally expected to contact the company.

The Manager gave evidence. Following a telephone call to the company on 11th February 2008 from the claimant he tried to telephone the claimant but could not get through to him. He subsequently spoke to the office manager who had received the call from the claimant. The manager said many customers place orders by mobile phone and it was necessary to retrieve the mobile phone to deal with the orders. He called to the claimant's house that morning and spoke to the claimant's mother who told him the claimant had in fact been assaulted in the early hours of Sunday morning, 10th February 2008. She gave him back the company mobile phone.

Under cross-examination the manager said because the claimant did not answer his phone on the morning of Monday 11th February he decided to call to his house. The office manager had reminded him that the claimant had been late on several Mondays, approximately three in total, and he asked her to write these down on a piece of paper. He took this piece of paper with him to the claimant's house. When he spoke to the claimant's mother that morning he handed her the piece of paper and asked her to pass it to the claimant. Before lunch that day he informed the Managing Director of the claimant's injury.

He could not recall being handed a medical certificate by the claimant's mother the following day Tuesday, 12th February when she called to the company. If she had handed in the certificate he would have passed it to the office staff. He stressed that the company wanted to talk to the claimant but did not think of phoning him. He was aware the company had written to the claimant on several occasions. When he saw the claimant driving in the town after his injury he followed him in his car because he wanted to see how he was.

Claimant's Case:

The claimant's mother gave evidence. The claimant was assaulted outside a nightclub in the early hours of Sunday, 10th February 2008. The claimant telephoned the respondent on Monday 11th February 2008 saying he had the flu and could not go to work that day. She took the claimant to the hospital around 4.30 on the morning of Sunday 10th February. On Monday 11th February 2008 the Manager of the company called to her door around 10.30 am. She told him that her son had in fact been assaulted and

was in bed and asked him if he wanted to see the claimant who was in bed. The Manager said he did not want to know any details and asked for the company's mobile phone and also asked her to pass a piece of paper to the claimant.

Around 5.20 pm on Tuesday, 12th February 2008 the claimant's mother called to the respondent company. She handed the Manager the claimant's medical certificate. She spoke to him about the tone of his voice at the door the previous day. A second medical certificate was forwarded to the respondent approximately two weeks later.

Under cross-examination the claimant's mother said following a letter from the respondent, which stated that they were at a loss to understand how his injury affected his ability to work, she rang an office employee in the company and said if they wanted further information to contact the claimant's doctor.

The claimant gave evidence. He was employed by the respondent for 8 years as a Shop Assistant. He was involved in an assault outside a nightclub in Naas in the early hours of Sunday, 10th February 2008. On Monday, 11th February he telephoned the respondent and spoke to one of the office staff. He told her that he had the flu and expected to be back at work in the following few days. That morning the manager of the respondent company called to his house and requested the company mobile phone. His mother passed him a piece of paper from the manager which contained a monthly calendar and two days had been circled in late January.

He visited the doctor that evening. He received a medical certificate to cover the period 11th February to 25th February. The doctor apparently dated it 12th February 2008. His back was sore for approximately 4 – 5 weeks after that. He was on medication and told to exercise. While out one day in the town he saw the manager and waved to him from his car. He received no phone calls from the respondent during his absence on sick leave.

The claimant was unsure of the sick leave policy in the company. His understanding was that after two days one was required to get a medical certificate. His holiday entitlements were 20 days and this ran from January to December. He paid off the account he had in the company every two to three weeks depending on what he could afford.

The claimant established loss for the Tribunal.

Under cross-examination the claimant said he did not report the incident to the Gardai. The reason he told a member of staff in the company that he had the flu when he telephoned her on Monday, 11th February 2008 was because he did not want to upset her. He was very embarrassed. He did not receive any phone calls from the company but he furnished them with medical certificates to warrant his absence. He chose not to telephone the company because of the intimidating letters he received from them. He replied to those letters. He did not want to talk to the company. He did not expect to be followed around town.

The claimant's understanding from the tone of several letters from the company was that he was not wanted. He felt if the respondent did not accept his medical certificates they should have sought confirmation of his illness from an independent doctor. He had hoped to make a speedy recovery and return to work but on 8 April felt he had no choice but to leave the company. He requested the company to forward his P45 to him.

The claimant told the Tribunal that he had only taken three days holidays in January 2008. He contended he found it difficult to contact the company and thought it was ok to send in medical certificates. He had attended several physio sessions since his injury.

Determination:

The Tribunal has carefully considered the evidence adduced in the course of this hearing. The onus is on the respondent to demonstrate that the termination of employment was fair and reasonable.

The Tribunal notes that the claimant's conduct was less than exemplary. There had been the initial lie about what had made him unable to attend work on the Monday morning. Thereafter, the claimant closed down all lines of communication between himself and the respondent. In a small town, his failure to present himself at his workplace to explain his prognosis and likely return date was not ideal. There was never any question that the claimant was bed ridden. It is accepted that the claimant was out and about, and therefore in a position to call in to his workplace to keep his employer updated on the position.

It is additionally accepted by the Tribunal that the claimant was unfit to return to work and once medical certificates stating this fact had been presented to the respondent, they cannot reject the veracity of such medical findings without at least bothering to have their own medical examination conducted.

The Tribunal finds that the respondent's son, who was a manager in the company, single-handedly escalated the situation between the claimant and the respondent. He had no entitlement to present himself at the claimant's home, unannounced. He involved the claimant's mother in an unacceptable scene on her own doorstep. Whilst it was wrong of the claimant to cover up an assault by saying he had flu, the discovery of this untruth only came to light after the respondent's son had presented himself at the claimant's home in what can only be described as a rage.

The Tribunal cannot find that the behaviour described as acceptable. This was an employee who had given loyal service for eight years. There had been no disciplinary issues with the claimant during his employment, and even if there had been, there were no disciplinary policies or procedures recognised in this workplace. On the evidence disclosed, it seemed that the respondent operated without the benefit of modern workplace standards.

The Tribunal ultimately finds that both parties to this case mishandled the situation but in the circumstances, finds that the dismissal was unfair. Accordingly, the Tribunal finds that the claim under the Unfair Dismissals Acts, 1977 to 2001 succeeds and the claimant is awarded €3600.00 as compensation under the Acts. The appeal under the Minimum Notice and Terms of Employment Acts, 1973 to 2001 is allowed and the appellant is awarded €1788.00 as compensation for four week's gross pay in lieu of notice. The Tribunal makes an award of €89.40 as compensation for one day of annualleave in respect of the claim under the Organisation of Working Time Act, 1997.

Sealed with the Seal of the

Employment Appeals Tribunal

This _____

(Sgd.) _____
(CHAIRMAN)